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OFFICE OF PETITIONS

In re Patent No. 7,672,998	:
Issued: March 2, 2010	: DECISION ON REQUEST
Application No. 09/715,641	: FOR RECONSIDERATION
Filed: November 17, 2000	: OF PATENT TERM ADJUSTMENT
Attorney Docket No. ZIP00-01	

This is a decision on the "RESPONSE TO DECISION ON THE REQUEST FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. §1.705 AND 37 C.F.R. §1.703" filed on December 13, 2010, requesting that the patent term adjustment indicated on the above-identified patent be corrected from 1253 days to 1348 days.

The request for review of the patent term adjustment is **DISMISSED**.

Patentees are given **THIRTY (30) DAYS or ONE (1) MONTH, whichever is longer**, from the mail date of this decision to respond. No extensions of time will be granted under § 1.136.

The patent term adjustment indicated in the patent is properly reflected.

Patentees argues again that "as to the alleged miscalculation of the PTA due to appellate review; Applicants respectfully disagree with the PTO's interpretation of the statute. In particular, for Part (A) the USPTO states that an appeal is "taken" (and PTA counting-started) only after the applicant files the appeal brief while for Part (B) the USPTO states that time is being consumed by appellate review (and PTA counting-delayed) as soon as a notice of appeal is filed. Applicants suggest that a correct interpretation is that "appellate review by the Board" for Part (B) does not begin until after the examiner answer. In addition, here, the rejection was effectively withdrawn more that four months after the appeal brief was filed."

Patentees' argument has been considered, but not found persuasive.

Patentee has miscalculated the total patent term adjustment as patentee's calculation fails to take into account that a Notice of Appeal was filed February 6, 2007. The period consumed by appellate review, whether successful or not, is excluded from the calculation of B delay. See 35 U.S.C. 154(b)(1)(B)(ii).

An appeal to the Board of Patent Appeals and Interferences commences with the filing of a notice of appeal. See 35 U.S.C. 134(a). Generally, an appeal to the Board of Patent Appeals and Interferences ends with either 1) a Board decision, 2) the examiner reopening prosecution and issuing another Office action, or 3) the applicant filing a request to withdraw the appeal and reopen prosecution (e.g. the filing of a request for continued examination). In this instance, the period is 326 days, beginning on July 25, 2005 and ending on June 16, 2006. A review of the record reveals that the period of overlap is 108 days. Thus, B delay is 481 days. As such, the patent term adjustment is 1253 (931 "A delay" days, plus 615 "B delay" days, minus 108 overlap days, minus 185 applicant delay days) not 1348.

It is noted that the Office issued a Notice of proposed rulemaking entitled *Revision of Patent Term Extension and Adjustment Provisions Relating to Appellate Review and Information Disclosure Statements*, 76 FR 18990 (April 6, 2011). To the extent that the final rule on *Revision of Patent Term Extension and Adjustment Provisions Relating to Appellate Review* revises the interpretation of appellate review applied in this decision, Patentees are given one (1) month or thirty (30) days, whichever is longer, from the date of the final rule to file a request for reconsideration. No extensions of time will be granted under § 1.136.

Telephone inquiries specific to this decision should be directed to the undersigned Petitions Attorney at (571) 272-3212.

A handwritten signature in black ink, reading "Patricia Faison-Ball". The signature is fluid and cursive, with the first name "Patricia" and last name "Faison-Ball" clearly distinguishable.

Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions